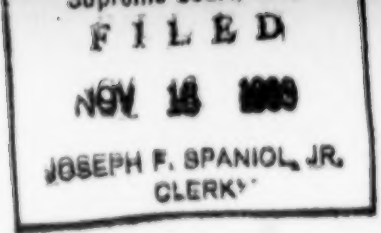


(13)  
No. 88-1905



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**In The**  
**Supreme Court of the United States**  
**October Term, 1988**

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**EDDIE KELLER, et al.**

*Petitioners,*

**v.**

**STATE BAR OF CALIFORNIA, et al.**

*Respondents.*

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**On Petition For Writ Of Certiorari  
To The California Supreme Court**

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**BRIEF OF STEVEN LEVINE AS  
AMICUS CURIAE IN SUPPORT OF PETITIONER**

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Steven Levine submits this brief, *amicus curiae*, pursuant to Rule 36 of the Rules of the Supreme Court of the United States, in support of the petitioner in No. 88-1905, having obtained the written consent of both petitioner and respondent to file this brief.

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### INTEREST OF AMICUS CURIAE

Attorney Steven Levine is a lawyer licensed to practice law in Wisconsin. He is a former two-term member of the State Bar of Wisconsin Board of Governors and has been a participant in proceedings before the Supreme Court of Wisconsin leading to that court's adoption of a state bar dues reduction rule whereby members who object to their dues being used for legislative purposes may reduce their annual dues. He is currently involved in litigation in the United States District Court for the Western District of Wisconsin in a case which in part involves the same issue as is involved in this case – and which may be controlled by the court's decisions in this case.

The purpose of this brief is to provide the court with information concerning the history, adoption and operation of the "Member Dues Reduction Rule" adopted by the Supreme Court of Wisconsin which allows bar members to withhold the pro rata share of their bar dues used for legislative advocacy purposes. It is a way in which one state supreme court has balanced the wishes of an integrated bar to be active in the legislative arena with the First Amendment rights of bar members who do not wish to be forced to support positions with which they disagree. As such, the rule may be helpful to this court in resolving the issue involved in this case.

## ARGUMENT

### I. PARTICIPATION BY AN INTEGRATED BAR IN THE LEGISLATIVE PROCESS IS A SIGNIFICANT CONSTITUTIONAL INFRINGEMENT REQUIRING AN ACCOMMODATION WITH FIRST AMENDMENT RIGHTS, AS IN UNION SHOP CASES. WISCONSIN HAS ADOPTED SUCH AN ACCOMMODATION.

#### A. Introduction

The question of whether and to what extent integrated bars may participate in the legislative process is an issue of significance across the country. The purpose of this brief is to inform the court of how one state is attempting to balance the wishes of the bar to be active in the legislative process with the First Amendment rights of dissenting members. The State of Wisconsin has adopted a plan whereby individual bar members may deduct the pro rata share of their mandatory bar dues which is used for legislative advocacy purposes. The purpose of this brief is to describe the background and workings of that plan.

#### B. Background of the Plan

In *Lathrop v. Donohue*, 367 U.S. 820 (1961) this court upheld integration of the State Bar of Wisconsin. In a plurality decision, the court held that the state's interest in improving the educational and ethical standards of the bar justified the restriction on First Amendment rights:

Both in purport and in practice the bulk of State Bar activities serve the function, or so Wisconsin

might reasonably believe, of elevating the educational and ethical standards of the Bar to the end of improving the quality of legal service to the people of the State, without any reference to the political process. It cannot be denied that this is a legitimate end of state policy. We think that the Supreme Court of Wisconsin, in order to further the State's legitimate interest in raising the quality of professional services, may constitutionally require that the costs of improving the profession in this fashion should be shared by the subjects and beneficiaries of the regulatory programs, the lawyers, even though the organization created to obtain the objective also engages in *some* legislative activity. *Id.* at 843. (Emphasis added)

The court declined to decide the issue of bar participation in the legislative process, however, determining that the record was inadequate to base a decision on this issue.

At the time of *Lathrop*, this court described the bar's participation in the legislative process as minor, as "some legislative activity." *Id.* at 843. By the late 1970's, however, legislative activity was described by the bar and noted by the Supreme Court of Wisconsin to be one of the bar's three major functions. *In re Regulation of the Bar of Wisconsin*, 81 Wis. 2d xxxv, xxxvi (1977).

With this change in emphasis of bar activity in mind, the Wisconsin Supreme Court in 1983 determined to adopt a dues reduction plan to allow dissenting bar members to deduct the pro rata share of their dues used for legislative purposes.



In response to the recommendation of a committee appointed by the court to study all aspects of bar operation, including legislative activity, the court determined to adopt a rebate procedure to protect the First Amendment rights of dissenting bar members who did not want their mandatory dues used for legislative purposes. The court stated:

This recommended rebate procedure is obviously in response to recent case law which addresses the issue of the use of mandatory membership dues to support political or ideological activity to which an individual member is opposed. See, *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), *Browne v. Milwaukee Board of School Directors*, 83 Wis. 2d 316, 265 N.W. 2d 559 (1978), *Falk v. State Bar of Michigan* (plurality opinion), 411 Mich. 63, 305 N.W. 2d 201 (1981), *Arrow v. Dow*, 544 F. Supp. 458 (D. N.M. 1982), *Schneider v. Colegio de Abogados de Puerto Rico*, 546 F. Supp. 1251 (D. P.R. 1982). Assuming, *arguendo*, that those cases are applicable here, we believe that the rebate procedure proposed by the committee is an acceptable and adequate response to any claimed infringement on the rights of those association members who oppose the association's position on specific legislation. Moreover, in order that a dissenting member not be required to specify those legislative issues on which the association has taken a position to which he or she is opposed, the rebate procedure should entitle a member to a rebate for that portion of his or her dues spent on all legislative activity, without specification, and if the objecting member wishes to contribute part of the rebated amount in proportion to the amount spent on legislative issues to which he or she was not opposed, he or she may do so voluntarily. In response to this recommendation

of the committee, we will propose such a rebate procedure for inclusion in the rules governing the State Bar, and we will hold a public hearing on the proposal, with a view to implementing a rebate procedure prior to the conclusion of the coming legislative session.

*Report of Committee to Review the State Bar*, 112 Wis. 2d xix, xxiii, xxiv, 334 N.W. 2d 544 (1983).

### C. Substance of the Plan

Subsequent to hearings, the Supreme Court of Wisconsin in 1986 adopted SCR 10.03(5)(b). The rule states:

1. In this paragraph, "legislative activities" means activities intended to advocate a position of the state bar with respect to contemplated, pending or existing legislation. "Legislative activities" does not include the review and analysis of contemplated, pending or existing legislation not intended to influence that legislation.
2. Prior to the beginning of each fiscal year the state bar shall establish, as part of its annual budget for that year, a budget specifically for legislative activities for that year and shall set forth in the dues statement it sends to its members for that year each member's pro rata portion, according to class of membership, of the amount budgeted for legislative activities.
3. A member of the state bar may deduct from the mandatory dues payable for each fiscal year the member's pro rata portion of the amount budgeted for legislative activities, and the state bar's established budget for legislative activities for each fiscal year shall

be reduced by the total amount of mandatory dues deducted by members for that year.

4. A member of the state bar not required to pay dues shall be given the opportunity at the beginning of each fiscal year to indicate on a form supplied by the state bar whether or not the member approves of the state bar's legislative activities for that year.

See *In the Matter of the Amendment of State Bar Rules: SCR 10.03(5) – Member Dues Reduction*, 127 Wis. 2d xi, xii (1986). As explained in the court's order, the rule was changed from the dues rebate rule proposed in the notice of hearing to a dues reduction rule after the court considered "judicial decisions of other jurisdictions on the issue of the constitutionality of a procedure by which an organization's member dues are rebated to members after the dues have been paid and the organization has had the use of them for a period of time." 127 Wis. 2d at xi. See *Ellis v. Railway Clerks*, 466 U.S. 435 (1984).

Subsequent to adoption of this rule by the Supreme Court of Wisconsin, the state bar itself adopted an arbitration procedure "to resolve any dispute with regard to the calculation of the dues reduction." See *Petition to Review Bar Amendments*, 139 Wis. 2d 686, 689, 407 N.W. 2d 923 (1987). The procedure was prompted by this court's decision in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986).

Thus, the Wisconsin Supreme Court and State Bar of Wisconsin have adopted a dues reduction rule and dispute arbitration rule specifically modeled on this court's pronouncements in the union shop cases.

#### D. Operation of the Plan

Operation of the Wisconsin dues reduction plan has been both simple and practical. The Wisconsin supreme court's rule requires that the bar set a budget for legislative activities prior to each fiscal year. That budget is based on both an estimate of how much will be spent on legislative activities for the coming year as well as the amounts spent on those activities in each of the past three years. See *Legislative activities dues reduction*, Wisconsin Bar Bulletin, vol. 59, no. 12, p. 22 (Dec. 1986).

The total legislative activities budget is divided by the number of bar members – by class of membership – to arrive at the amount of dues reduction which each member may choose to subtract from his or her annual dues payment. All legislative advocacy expenses are included in the plan. There is no attempt to differentiate expenses by subject matter on which the bar takes legislative positions – no attempt to exclude from the dues reduction plan legislative activity which might be classified as pertaining to "the administration of justice." All legislative activity as defined in the supreme court rule is included in the plan. In the first year of the plan's operation, approximately 30% of bar members withheld the legislative activities amount from their dues payment. *Id.* at p. 23.

While there remain serious constitutional questions concerning certain substantive and procedural aspects of the Wisconsin dues reduction plan, adoption and operation of the plan illustrate a number of points. First, the plan indicates a recognition by one state supreme court of the impropriety of forcing bar members to contribute to

the advocacy of legislative positions with which they disagree.

Second, the plan aims at simple and practical operation – not involving itself in attempting to differentiate legislative advocacy on subjects which might be defined as “the administration of justice” from other topics outside that classification. If error is to be made in balancing the First Amendment rights of mandatory bar members against those of bar legislative activity, the plan errs in favor of those bar members who do not wish to subsidize the propagation of views with which they disagree.

Finally, the legislative activities dues reduction rule as well as the bar’s arbitration bylaw are patterned after the requirements of this court’s decisions in the union shop cases – *Abood*, *Ellis*, and *Chicago Teachers Union*. See *Report of Committee to Review the State Bar, supra*, 112 Wis. 2d at xxiii and *Petition to Review Bar Amendments, supra*, 139 Wis. 2d at 691. The plan constitutes a recognition that lawyers deserve the same First Amendment rights as the members of any other profession:

The First Amendment does not distinguish between lawyers and other occupations. Unless there is an important governmental interest requiring otherwise, lawyers are entitled to the same protection from the compelled support of ideas that are accorded labor union members.

*Arrow v. Dow*, 544 F. Supp. 458, 460, 461 (D. N.M. 1982).

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## CONCLUSION

Members of compulsory bar associations ought not be forced to participate in the legislative process against their wills or to financially support legislative positions with which they disagree.

The Wisconsin dues reduction plan constitutes a necessary accommodation of conflicting rights based on this court’s decisions in the union shop area.

Respectfully submitted,

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